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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-359

LEANDER H. PEREZ, JR.,

Petitioner

versus

GARY DUNCAN,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on June 14, 1971.

OPINIONS BELOW

On October 20, 1970 the United States District Court, Eastern District of Louisiana, enjoined the defendant District Attorney from prosecuting appellee. The case is reported in 321 F. Supp 181 and printed in Appendix A hereto. On June 14, 1971 the United States Court of

Appeal for the Fifth Circuit affirmed that decision with written reasons. The case is reported in ..... F. 2d ..... and printed in Appendix B hereto. No petition for rehearing was filed.

JURISDICTION

The judgment sought to be reversed was rendered and entered on June 14, 1971 and is attached hereto as Appendix B.

Jurisdiction of this Court is sought pursuant to 28 U.S.C. 1254.

QUESTIONS PRESENTED FOR REVIEW

1. Whether findings of bad faith, harassment and chilling effect are findings of ultimate fact or conclusions of law, as opposed to evidentary fact and reviewable by the Appellate Court independent of the District Court determination, and not subject to the "clearly erroneous" concept, and if not, can such findings be cured by change of venue.

2. Whether bad faith and harassment of the attorney for a state court defendant in criminal proceedings is imputed to the defendant himself in order to justify a federal injunction.

3. Whether an Appellate Court can review all facts when the District Court issues an injunction to stay proceedings pending in a state criminal court at the time the federal suit was begun, in the light of the recent decisions of this Honorable Court.

4. Whether there was bad faith, harassment, chilling effect and a ligitimate state interest in the prosecution of appellee, and if so whether irreparable injury to appellee must be established before a federal injunction can issue.

5. Whether federal injunction of state court criminal prosecution can be issued to protect federally secured rights other than First Amendment Rights.

6. Whether injunctive relief was barred by the Anti-Injunction Statute, 28 U.S.C. 2283.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory provisions involved are as follows: 28 U.S.C. 1343:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42:

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, or any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

28 U.S.C. 2201:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes any Court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. 2202:

Further necessary or proper relief based on a declara-

tory judgment or degree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

28 U.S.C. 2283:

A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

UNITED STATES CONSTITUTION: First Amendment

Congress shall make no law respecting an establishment or religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

The evidentary facts found by the trial Judge and set forth in the opinion of the United States Court of Appeal for the Fifth Circuit are repeated here:

On October 18, 1966 Gary Duncan, a 19 year old Negro male slapped or otherwise struck one Herman Landry, Jr., who was 12 years of age. Landry and three of his young companions were talking to the Negro boys, who were related to Duncan, when he drove upon the scene on Hwy. 23 in Plaquemines Parish. After some conversation Duncan told his relations to get into the car and while doing so Landry said "you must think you're tough", whereupon Duncan struck Landry.

Deputy Smith investigated, but since the misdemeanor had not occurred in his presence he could not and did not arrest Duncan. Young Landry went home and reported the incident to his parents who went to the Justice of the Peace and preferred charges of cruelty to a juvenile.

At a hearing on this charge Duncan was represented by Attorneys Robert Collins of New Orleans and Richard Sobol of Washington. The charge was dismissed on a technicality (no parental authority and Mrs. Landry then filed a charge of simple battery before the same Justice of the Peace.

On January 25, 1967 Duncan was tried before the District Judge in Plaquemines Parish and after being found quality he was sentenced to 60 days in jail and fined $150.00.

Duncan, through his attorneys, applied for writs to the Louisiana Supreme Court and after the writ was denied he applied for writs to the United States Supreme Court and the conviction was set aside on the grounds that Duncan was entitled to a jury trial and the case was "remanded".

After the State of Louisiana reduced the maximum sentence on misdemeanors from 2 years to six months the District Attorney set Duncan's case for retrial.

REASONS FOR GRANTING THE WRIT AND ARGUMENT

A. Findings of bad faith, harassment, chilling effect, legitimate state interest and irreparable injury are not evidentiary findings of fact but are findings of ultimate

fact or conclusions of law not subject to the "clearly erroneous" concept or standard.

Ultimate facts are defined in Black's Law Dictionary, Deluxe Forth Edition, as:

> "Those facts found in that vaguely defined field lying between evidential facts on the one side and the primary issue or conclusion of law on the other, being but the logical results of the proofs, or, in other words, mere conclusions of fact. The final or resulting fact reached by processes of logical reasoning from the detached or successive facts in evidence, and which is fundamental and determinative of the whole case. The final resulting effect reached by processes of legal reasoning from the evidentiary facts."

We do not quarrel with the findings of evidentary fact and we have quoted them as the statement of facts in this petition. We do, however, seriously question the conclusions reached by the District Court from these facts. We further submit that the Appellate Court is charged with the duty to make its own conclusions by the process of legal reasoning. The court of appeals failed to do this and this Honorable Court should correct that wrong.

In *Younger vs. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669, (February 23, 1971), *Boyle vs. Landry*, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed. 2d 696, (February 23, 1971). *Byrne vs. Karalexis*, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed. 2d 792, (February 23, 1971), and *Dyson vs. Stein*, 401 U.S. 200, 91 S.Ct. 769, 27 L.Ed. 2d 781, (February 23, 1971) the United States District Court had enjoined state court criminal prosecutions and this Honorable Court reversed.

In *Boyle* the plaintiffs alleged specific facts and concluded that they, as negroes, were being harassed and intimidated, that they were arrested without probable cause coupled with the setting of exorbitant bail. The plaintiffs further claimed that the statutes had "been applied in bad faith, solely for the purpose of discouraging civil rights activities." (280 F. Supp. 938 at 949). This Honorable Court held "It is obvious that the allegations of the complaint in this case fall far short of showing irreparable injury. . .".

Certainly in the light of the recent decisions of this Honorable Court, as above cited, Appellate Courts can and should review all facts when a state court criminal prosecution is enjoined.

We further submit that the Court of Appeals for the Fifth Circuit erred when it held that if there is bad faith "irreparable injury need not be shown provided there is present a basis for Federal jurisdiction". Contrary to the statement of Appellate Court, *Younger vs. Harris*, supra, does not so hold.

In the instant case the District Judge testified that he would not only recuse himself but that he would order a change of venue. This insures that the state court defendant will secure a fair trial by another state court with prosecution by an impartial district attorney.

Under these circumstances we fail to understand how the District Court's finding of bad faith warrants an injunction against a reprosecution of a person previously found guilty.

Even if there is presently bad faith and harassment

this is not the test. The question is attitudes at the time the prosecution began. The Court of Appeal and the District Court both refused to pass upon this issue.

In the instant case the Defendant District Attorney had never even heard of Appellee, and did not know of his being prosecuted until his trial was actually in progress.

B. A bad faith feeling towards and harassment of the attorney for a state court defendant in criminal proceedings cannot be imputed to the defendant himself.

Even if the District Court properly found bad faith and harassment on the part of the defendant district attorney towards the attorney for the appellee, this is not sufficient grounds for a federal injunction.

In the instant case there is no evidence of ill will towards the appellee by the appellant. There is evidence of ill will towards appellee's attorney but this is not sufficient.

The quotation of testimony in the opinion of the United States District Judge, deals with the type of representation by Sobol and the feelings of the State District Judge that Sobol's only interest was to set aside a long standing Louisiana law dealing with jurors in misdemeanor cases. The State Court obviously felt that Sobol did not attempt to defend Duncan. The remarks of the District Judge as quoted by the court below, followed his statement that if Sobol defended Duncan in the re-prosecution, he, Judge Leon, would not sit as the Judge. This removes any hostility existing between the District Judge and Dun-

can's attorney, Sobol, which hostility came about by virtue of Sobol attempting to cite Judge Leon for contempt.

The entire Sobol trial, which occurred long after Duncan's trial, naturally left a bitter taste in the mouth of the District Attorney and District Judge and both reflect that taste and both felt and testified that they had been honest and fair, but that they now realize that the Duncan case was just a tool of Sobol.

We submit that hostile feelings towards an attorney is not and cannot be grounds for federal injunction in a criminal prosecution.

We therefore submit that the very most to which the defendant would be entitled would be a change of venue where he could be tried in a court not reflecting hostility to his attorney. He is certainly not entitled to a federal injunction.

C. The United States Court of Appeal for the Fifth Circuit has not properly applied the principles of the recent decisions of this Honorable Court restricting federal injunction of state court criminal prosecution.

The District Court did not have the benefit of *Younger vs. Harris*, supra, and the appellate court below did not properly apply the principle laid down in that case. The United States Court of Appeal for the Fifth Circuit held that even though this was not a First Amendment case and even though appellee was not exercising any federally secured right at the time of his commission of the crime charged, since the District Court had found bad faith and harassment, which such findings were not "clearly erroneous", the federal injunction was proper.

The majority opinion in *Younger vs. Harris*, supra, held:

> "One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."
> "This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity', that is a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to described it, is referred to by many as 'Our Federalism, . . .'"
>
> "It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future."

D. There was no bad faith, harassment or chilling effect towards appellee and the State of Louisiana had a legitimate interest in his prosecution. Irrespective of this there was no irreparable injury to appellee which must be established.

The Appellate Court held that the District Court's conclusions were not "clearly erroneous", which is a greater burden on appellant that the law requires. We

submit that the evidentary facts do not show bad faith and harassment on the part of the only defendant-appellant herein who had nothing whatsoever to do with arrests, bail fixing, sentencing or appeal bonds.

The statement of the District Attorney about Appellee's attorney were made in a deposition before the trial below and years after appellee's conviction in State Court.

Both the District Court and the Appellate Court found no legitimate state interest because they concluded that the battery committed by appellee was "*de minimus*" and "so slight and technical as to be generally reserved for law school hypotheticals rather than criminal prosecution." By what authority is a federal court authorized to tell a State Court what batteries should be and what batteries should not be prosecuted? A nineteen year old man admittedly slapped or otherwise struck a twelve year old boy and the boy's father was outraged.

The Appellate Court below further held that irreparable injury is not needed when the prosecution is in bad faith and for purpose of harassment. We submit that *Younger vs. Harris*, supra, does not so hold.

This is not a class action and if appellee is tried for simple battery, not arising out of any federally secured rights, outside Plaquemines Parish he could not conceivably suffer irreparable harm.

This Honorable Court in *Samuels vs. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed 2d 688 (February 23, 1971) said:

"In No. 2, Younger v. Harris, we today decided

on facts very similar to the facts of these cases that a United States District Court could not issue an injunction to stay proceedings pending in a state criminal court at the time the federal suit was begun. This was because it did not appear from the record that the plaintiffs would suffer immediate irreparable damages in accord with the rule set out in Douglas v. City of Jeannette, 319 U.S. 157, (1943), and many other cases."

"In our opinion in the Younger case, we set out in detail the historical and practical basis for the settled doctrine of equity that a federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal suit except in very unusual situations, where necessary to prevent immediate irreparable injury."

In *Dyson v. Stein*, supra, this court said:

"Today we have again stressed the rule that federal intervention affecting pending state criminal prosecutions, either by injunction or by declaratory judgment, is proper only where irreparable injury is threatened. Douglas v. City of Jeannette, 319 U.S. 157, (1943)."

In *Douglas vs. City of Jeannette*, 319 U.S. 157 (1943) this court said:

"In addition, however, the Court also made clear that in view of the fundamental policy against federal interference with state criminal prosecutions, even irreparable injury is insufficient unless it is 'both great and immediate.' Fenner, supra. Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal pros-

> ecution, could not by themselves be considered 'irreparable' in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution."

In *Byrne v. Karalexis*, supra, the appellees obtained a federal injunction prohibiting their prosecution for possession of obscene films on the grounds that the state statute was unconstitutional and the prosecution was brought "without hope of success". The three judge district court found irreparable injury saying:

> "We do not agree with defendant's contentions that there is no indication of irreparable injury. Even if money damages could be thought in some cases adequate compensation for delay, this defendant will presumably be immune. We agree with plaintiffs that the box office receipts, if there is a substantial delay, can be expected to be smaller. A moving picture may well be a diminishing asset. It has been said, also, that in assessing injury the chilling effect upon the freedom of expression of others is to be considered. See Dombrowski vs. Pfister, 380 U.S. 479, 486-489 (1965)."

But this Honorable Court said:

> "There was, however, no finding by the District Court that the threat to appellee's federally protected rights is 'one that cannot be eliminated by his defense against a single criminal prosecution.' Younger v. Harris, ante. Because of the District Court, in considering the propriety of injunctive and declaratory relief in this case, was without the guidance provided today by our decisions in Younger v. Harris,

supra, and Samuels v. Mackell, ante, we vacate the judgment below and remand for reconsideration in light of those decisions."

On the subject of "chilling effect" this Honorable Court in *Younger vs. Harris*, supra, said:

> "Moreover, the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but — while regulating a subject within the State's power — tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so: Schneider v. State, 308 U.S. 147, 84 L.Ed 155, 60 S.Ct. 146 (1939); Cantwell v. Connecticut, 310 U.S. 296, 84 L.Ed 2d 1213, 60 S.Ct. 900, 128 ALR 1352 (1940); Mine Workers v. Illinois Bar Assn., 389 U.S. 217, 19 L.Ed 2d 426, 88 S.Ct. 353 (1967). Just as the incidental 'chilling effect' of such statutes does not automatically render them unconstitutional, so the chilling effect that admittedly can result from the very existence of certain laws on the statute books does not in itself justify prohibiting the State from carrying out the important and necessary task of enforcing these laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and the Constitution."

E. A federal injunction of a state criminal prosecution cannot be issued to protect rights other than First Amendment Rights.

Appellee was not exercising any federally secured rights at the time he committed the crime of simple battery. His case is not a civil rights case.

Appellee was particularly not exercising any First Amendment Rights. Every case cited by the District Court and the Appellate Court dealt with injunctions pertaining to First Amendment Rights. In fact all the cases cited herein are First Amendment cases.

The Fifth Circuit even disregarded its opinion in *Sheridan vs. Garrison*, 415 F 2d 699 (1969), which held:

> "Thus we emphasize that our decision is in the contest of First Amendment rights only. Furthermore, we limit our decision in two ways. First, we consider only the case before us, that is the case in which a criminal prosecution has 'begun' only in a technical sense with the filing of any information or indictment, and not the case in which trial proceedings are under way. Second, we consider only the case in which it appears that, if First Amendment rights are in jeopardy, no other equally effective protection can be had for them than resort to the federal injunction. For if a criminal trial is under way, or if a less severe remedy that a federal injunction is available and will be fully effective, the considerations of comity behind § 2283 may be different. CF. Stefanelli v. Manard, supra, 342 U.S. at 117, 72 S. Ct. at 118."
> "The distinction between Wilson or Dade County and the case at bar is evident on the fact of the pleadings. Here appellants do not rely upon a mere conclusion that their First Amendment rights are being chilled because of a violation of some other, unrelated civil right, but they allege specific facts that, if proved, would support the conclusion."

F. The Federal Anti-Injunction Statute, 28 U.S.C. 2283, applies.

Both the District Court and the Appellate Court held that 28 U.S.C. 2283 does not apply.

Mr. Justice Stewart, with whom Mr. Justin Harlan joined, in *Younger vs. Harris*, said:

> "The Court confines itself to deciding the policy considerations that in our federal system must prevail when federal courts are asked to interfere with pending state prosecutions. Within this area, we hold that a federal court must not, save in exceptional and extremely limited circumstances, intervene by way of either injunction or declartion in an existing state criminal prosecution." (Page 682 L.Ed 2d. vol. 27).

(3) The negative pregnant in this sentence — that a federal court may, as a matter of policy, intervene when such "exceptional and extremely limited circumstances" are found — is subject to any further limitations that may be placed on such intervention by 28 U.S.C. § 2283. See p. 15.

The majority in *Younger vs. Harris*, supra, held:

> "Since the beginning of this Country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts. In 1793 an Act unconditionally provided: '. . . nor shall a writ of injunction be granted to stay proceedings in any court of any state. . .' 1 Stat. 335, c. 22. A comparison of the 1793 act with 28 U.S.C. § 2283, its presentday successor, graphically illustrates how few and minor have been the exceptions granted from the flat, pro-

> hibitory language of the old act. During all this lapse of years from 1793 to 1970 the statutory exceptions to the 1793 congressional enactment have been only three (1) ". . . except as expressly authorized by Act of Congress. . ."; (2) ". . . where necessary in aid of its jurisdiction. . ."; and (3) ". . . to protect or effectuate its judgments. . ." In addition, a judicial exception to the longstanding policy evidenced by the statute has been made where a person about to be prosecuted in a state court can show that he will, if the proceedings in the state court is not enjoined, suffer irreparable damages."

The dissenting opinion of Mr. Justice Douglas in *Boyle v. Landry*, supra, and *Younger v. Harris*, supra, emphasized the thinking of the majority of the United States Supreme Court insofar as federal courts enjoining state criminal prosecutions. Mr. Justice Douglas said:

> "The fact that we are in a period of history when enormous extrajudicial sanctions are imposed on those who assert their First Amendment rights in unpopular causes emphasizes the wisdom of Dombrowski v. Pfister, 380 U.S. 479."
>
> "Dombrowski represents an exception to the general rule that federal courts should not interfere with state criminal prosecutions. The exception does not arise merely because prosecutions are threatened to which the First Amendment will be the preferred defense. Dombrowski governs statutes which are a blunderbuss by themselves or when used en masse — those that have an 'overbroad' sweep."
>
> "The 'anti-injunction' statute, 28 U.S.C. § 2283

is not a bar to a federal injunction under these circumstances."

"The Court dismisses this case because there is no showing of irreparable injury on what it described as 'flimsy allegations.' Ante, at 5. The Court states: 'There is nothing contained in the allegations of the complaint from which one could infer that any one or more of the citizens who brought this suit is in any jeopardy of suffering irreparable damages if the State is left free to prosecute under the intimidation statute in the normal manner.' Ante, at 4. Landry and his associates, however, allege that appellants were using the intimidation section along with several other sections to harass them, not to prosecute them in the normal manner. They allege that appellants are arresting them without warrants or probable cause, and detaining them on excessive bail. They allege that the arrest are made during peaceful demonstrations and without any expectation of securing valid convictions. In sum, Landry, and his group allege that the 'intimidation' section is one of several statutes which appellants are using en masse as part of a plan to harass them and discourage their exercise of their First Amendment rights."

"In Younger there is a prosecution under an unconstitutional statutes and relief is denied. In Boyle there is harassment but as yet no prosecution. Allegations of a prosecution or harassment under facially unconstitutional statutes should be sufficient for the exercise of federal equity powers."

"Dombrowski and 42 U.S.C. § 1893 indicate why in Boyle federal intervention against enforcement of the state laws is appropriate. The

case of Younger is even stronger. There the state statute challenged is the proto-type of the one we held unconstitutional in Brandenburg v. Ohio, supra. The eternal temptation, of course, has been to arrest the speaker rather than to correct the conditions about which he complains. I see no reason why these petitioners should be made to walk the treacherous ground of these statutes. They, like other citizens, need the umbrella of the First Amendment as they study, analyze, discuss and debate the troubles of these days. When criminal prosecutions can be leveled against them because they express unpopular views, the society of the dialogue is danger."

CONCLUSION

Petitioner, Leander H. Perez, Jr., urges this Court to issue a Writ of Certiorari to the Fifth Circuit in order to clearly define the law as to injunctions issued by Federal Courts prohibiting State Court criminal prosecutions, and to correct a clearly erroneous decision.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of the foregoing petition for certiorari and accompanying brief has been served on opposing counsel by depositing same in the United States mail, postage prepaid, this ____ day of September, 1971.

SIDNEY W. PROVENSAL, JR.

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

CIVIL ACTION NO. 69-7

SECTION "E"

GARY DUNCAN, Plaintiff

versus

LEANDER H. PEREZ, JR., Defendant.

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CASSIBRY, District Judge:

This action was brought pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1343(3), 28 U.S.C. §§ 2201-2202, and the equity jurisdiction of the court.

In October, 1966, plaintiff Gary Duncan was ar-

rested in Plaquemines Parish, Louisiana (the Twenty-Fifth Judicial District) and was charged with cruelty to a juvenile in violation of La. Rev. Stat. § 14:93. Duncan, a Negro, was alleged to have slapped a white youth on the arm after breaking up a confrontation between four white boys and two Negro boys (both cousins of Duncan's) near the then recently integrated Boothville-Venice School.

Because his arrest was related to the racial tension which accompanied the federally ordered desegregation of schools in Plaquemines Parish,[1] Duncan was concerned over his ability to secure a vigorous defense against the criminal charges lodged against him from among the attorneys practicing in the Parish. He retained instead Robert F. Collins, a black attorney practicing in New Orleans, and Richard B. Sobol, a civil rights attorney from the North.

On November 25, 1966, Collins and Sobol appeared for Duncan at his arraignment in juvenile court in Pointe a la Hache. They filed a motion to quash the information against plaintiff on the ground that, under Louisiana law, one of the elements of the crime of cruelty to a juvenile is a parental relationship between the defendant and the juvenile involved. The case was continued pending a hearing on the motion.

After the conference, an Assistant District Attorney advised the original ocmplainants that the juvenile charge was probably invalid, and that an affidavit charging simple battery should be filed. This was done the same day, and the following day, i.e., the day after his appear-

[1] See United States v. Plaquemines Parish School Board, Civil Action 66-71A (E.D. La.)

ance in court with Collins and Sobol, plaintiff was arrested for a second time.

When Duncan was first arrested on the juvenile charge, a bond of $1,000 was set in accordance with the suggested bond schedule in effect in the Parish. When he was arrested for the second time, the District Judge set bond at $1,500, or double the $750 figure for simple battery included in the suggested bond schedule. Shortly thereafter, the cruelty to juvenile charge was nolle prossed by the State.

On January 25, 1967, the simple battery charge against Duncan came to trial. All the witnesses at trial described an incident in which four white boys were standing facing two Negro boys on the side of the highway near the Boothville-Venice School, shortly after the end of the school day. The Negro boys were both cousins of Gary Duncan's. Duncan was driving by, saw the confrontation, stopped his car, got out, instructed his two cousins to get into his car, returned to his car and drove off. During this time, Duncan touched one of the White boys on the arm. The only conflict in testimony concerned the nature of the touching. The witnesses for the state, three of the four white boys and a white onlooker, who was President of the private school association that had been established to avoid integration, testified that Duncan had slapped the white boy in a hostile manner. The wtinesses for the defense, the two Negro youths and Duncan, testified that Duncan had touched the boy on the arm in a conciliatory gesture, while encouraging him to go home. The trial judge resolved the factual conflict against Duncan and found him guilty of simple battery. Duncan was sentenced to two months in prison

and a $150 fine, with an additional twenty days in prison if the fine was not paid. Sentence in simple battery prosecutions was imposed eighty-four times in the Twenty-Fifth Judicial District Court between January, 1965 and January, 1970. In only fifteen of these was a prison term imposed that could not be avoided by the payment of an alternative fine. In only five did the sentence exceed that imposed on Duncan, and four of these involved an additional more serious charge against the defendant. In discovery proceedings in this court the state court trial judge testified that the following considerations affected his decision in sentencing Duncan:

> "I think that this case and your [Sobol's] representation as a member of the Lawyer's Constitutional Defense Committee, you all found the proper forum, which was Plaquemines Parish, you all found the proper name, which was L. H. Perez, and also you found the proper time, the integration of the parish school system in the Parish of Plaquemines. You at no time, to my recollection of the case, attempted to defend this man of the charges, your sole attempt was to have the constitution of the state of Louisiana where it dealt with jury trials and misdemeanors, you wanted that declared unconstitutional, and that's the only thing you did, sir."

Although under state law, Duncan was entitled to bond pending review in the Supreme Court of Louisiana and although bond pending review was granted, after sentencing Duncan was immediately arrested for the third time and remained in prison until the new bond could be set. Review was denied by the Supreme Court of Louisiana on February 20, 1967, and on February 21, 1967, Sobol went to Pointe a la Hache to apply for a continuation of

bond pending an appeal to the Supreme Court of the United States. Continuation of bond was denied but a new bond was set. Minutes after his meeting with the trial judge, Sobol was arrested and charged with unauthorized practice of law in violation of La. Rev. Stat. 37:213. The facts of the charge are fully discussed in this court's opinion in *Sobol v. Perez*, 289 F.Supp. 392 (E.D. La. 1968). There, we found that the arrest of Sobol was made in bad faith and for purposes of harrassment.

> "This prosecution was meant to show Sobol that civil rights lawyers were not welcome in the parish, and that their defense of Negroes involved in cases growing out of civil rights efforts would not be tolerated. It was meant also as a warning to other civil rights lawyers and to Negroes in the parish who might consider retaining civil rights lawyers to advance their rights to equal opportunity and equal treatment under the Equal Protection Clause of the Fourteenth Amendment." 289 F. Supp. at 402.

This court enjoined the prosecution.

In the day or two following Sobol's arrest, Duncan and persons acting in his behalf tried on several occasions to post the new bond with the Sheriff's office. Each time they were told that the earlier bond was still valid and that no further bond need be posted. On February 22, 1967, *Sobol v. Perez* was filed in this court. On February 23, in what appears to be a special hearing held for this purpose, without notice to Duncan's counsel, the District Attorney, Leander H. Perez, Jr., the defendant here, informed the court that Duncan had not posted the bond set by the court in its meeting with Sobol on February 21, and asked that a warrant for Duncan's arrest be issued.

Late that night, Duncan was arrested from his home in Boothville and taken to the Pointe a la Hache prison. Although there is testimony in the record conflicting with Duncan's statement that he was ridiculed, frightened and insulted during his trip to the prison, all witnesses agree that the night-time arrest and transportation to the Parish Prison for failure to post bond were highly unusual.

After this, his fourth arrest, relatives of Duncan attempted to post a property bond in the amount of $1,500, the amount established by the District Judge. For twenty-four hours, the Sheriff's office maintained the position that the bond could be met only if property with *double* its assessed value was pledged. The Louisiana Code of Criminal Procedure, Art. 324, explicitly provides that bonds can be met by posting property of an assessed value equal to the amount of the bond. The District Judge and the deputy sheriff in charge of the jail testified that the requirement that a double bond be posted was inconsistent with past practice in the Parish.

On May 20, 1968, Duncan's conviction was reversed by the Supreme Court of the United States, on the ground that Duncan had been denied trial by jury. The case was "remanded for further proceedings not inconsistent with this opinion." *Duncan v. Louisiana*, 391 U.S. 145, 162. On July 22, 1968, this Court issued its decision enjoining the trial of Sobol on the unauthorized practice charge.

Shortly after the rendition of judgment, a motion was made by the plaintiffs in *Sobol* (one of whom was Duncan), asking that the Court's judgment be expanded to

enjoin retrial of Duncan on the simple battery charge. The motion was denied by the Court on the ground that plaintiffs by their pleadings had not placed this claim in issue.

On January 3, 1969, this suit was instituted against the District Attorney of the Twenty-Fifth Judicial District, seeking an injunction against the reprosecution of Duncan. The case was tried on June 8, 1970. At that time, the court received numerous depositions in evidence, as well as several stipulated exhibits. In addiiton, the court agreed to judicially notice all of the extensive record in the *Sobol* case. After a careful examination of this record, the court has concluded that plaintiff has sustained the heavy burden required for an injunction against a pending state criminal proceeding.[2]

On the basis of the evidence of record, the court has concluded:

First, that the proceeding against Duncan in state court is maintained by the defendant in bad faith and for purposes of harassment. The multiple arrests, the unusually high bond on the battery charge, the unusually high sentence on the battery conviction, the unlawful demand that double bond be posted, the arrest of Sobol,

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[2] At the trial of this matter, plaintiff took the position that the collateral estoppel doctrine barred the introduction of evidence by the defendant, which would tend to contradict or disprove any of the facts found by this court in Sobol v. Perez. The court took the objection under advisement and permitted the introduction of all of defendant's evidence, pending a decision on the objection. Although the issue has been extensively briefed by both sides, the court has concluded that there is no necessity to decide that issue because the parties are in agreement that, at the very least, the court can judicially notice all the proceedings in *Sobol* (see Shuttlesworth v. City of Birmingham, 394 U.S. 147, 157 (1969); Wright v. City of Montgomery, 406 F.2d 867, 869, n. 5 (5th Cir. 1969), and because the defendant, in his presentation in this matter, has not succeeded in disproving any facts found in Sobol which are relevant to the court's disposition of this case.

and the comments of the defendant and the state district judge, all taken together, established that these authorities are personally hostile to Duncan and have altered established principles of criminal procedure in an effort to punish Duncan for his exercise of federally secured rights.

Second, there is no legitimate state interest in the reprosecution of Duncan. Without attempting to resolve the disputed issue of whether Duncan slapped or simply touched the white youth on the arm, it is clear beyond dispute that any violation that may have occurred was so slight and technical as to be generally reserved for law school hypotheticals rather than criminal prosecutions. The white boy was not hurt and displayed no bruise minutes after the incident. *De minimus* "batteries" of this kind occurr repeatedly in Plaquemines Parish and elsewhere and do not become the subject of criminal proceedings. The factors bearing on the questions of harassment, considered together with the nature of the conduct on which the charge is based, convince the court that the charge against Duncan would not have been prosecuted, and certainly not reprosecuted, were it not for the civil rights context out of which the case arose, for Duncan's selection of civil rights attorneys to represent him, and for the vigor of his defense.

Third, the reprosecution of Duncan would deter and suppress the exercise of federally secured rights by Negroes in Plaquemines Parish. The various stages of the *Duncan* and *Sobol* cases have been thoroughly publicized in the New Orleans papers, which the parties have stipulated are the only daily newspapers generally read by residents of Plaquemines Parish. Duncan has waged

an unprecedented four year fight to avoid conviction and incarceration on the charges against him. Not only did the charge against him relate to the occasional racial violence that accompanied the integration of the Booth-ville-Venice School, the civil rights overtones of the case were underscored by the participation of civil rights attorneys, by the appeal to the Supreme Court of the United States, and by the arrest of Sobol and the extensive proceedings which followed. If Duncan were required to face retrial, it would constitute an unmistakable message to Negroes in Plaquemines Parish that it is unprofitable to step outside familiar patterns and to seek to rely on federal rights to oppose the policies of certain parish officials. The destructive effect on the exercise of federal rights could not be corrected by Duncan's possible subsequent success in state or federal court.

> "[T]he ultimate resolution of the issues in this case at the state level is not an adequate remedy . . . the mere fact of the prosecution produces the harm and irreparable injury." Sobol, 289 F. Supp. at 402.

Duncan can assert this injury for himself and for other Negro residents of the Parish. See *NAACP v. Alabama*, 357 U.S. 449, 459 (1958).

These findings warrant the issuance of an injunction against the retrial of Duncan. See *Sobol v. Perez*, 289 F.Supp. 392, 400 (E.D. La. 1968); *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *City of Greenwood v. Peacock*, 384 U. S. 808, 829 (1966).

The defendant has argued that this relief is barred by 28 U.S.C. § 2283, which provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

In two recent cases, this court has had the occasion to consider the import of Section 2283. See *Brock v. Schiro*, 264 F. Supp. 330 (E.D. La. 1967); *Vick v. Schiro*, 296 F.Supp. 173 (E.D. La. 1969). On the facts of both cases, this court declined to issue an injunction against prosecutions pending in state courts, but explicitly recognized that where there is a "threat of irreparable injury clear and imminent" injunctive relief against proceedings pending in state court will be granted. *Brock, supra*, 264 F.Supp. at 337, citing *Stefanelli v. Minard*, 342 U.S. 117, 121 (1951); *Douglas v. Jeanette*, 319 U.S. 157, 164 (1943).

> ". . . [T]he Congressional command [Section 2283] ought to be ignored only in the fact of a most compelling reason, but we jave certainly been told by the Supreme Court in those circumstances it may be disregarded, for its parentage discloses that it was not intended to be as absolute as it sounds." *Baines v. City of Danville*, 337 F.2d 579, 593 (4th Cir. 1964). See also *Sheridan v. Garrison*, 415 F.2d 699 (5th Cir. 1969); *Machesky v. Bizzell*, 414 F.2d 283 (5th Cir. 1969); *Hulett v. Julian*, 250 F.Supp. 208 (M.D. Ala. 1966).

Shortly after this matter was filed, the defendant moved to dismiss on the ground that the relief sought is barred by Section 2283. The court denied the motion on the ground that the applicability or inapplicability of

Section 2283 depends on the factual showing made by the plaintiff. For the reasons stated above, plaintiff has established to the satisfaction of the court that the retrial of Duncan at this time will cause irreparable injury to the exercise of federally secured rights by Negro residents of Plaquemines Parish. In light of this finding, Section 2283 presents no obstacle to the granting of relief.

The foregoing constitutes the court's findings of fact and conclusions of law in this case. Counsel for plaintiff will, within twenty days, file with the court and serve on opposing counsel a proposed order. Counsel for defendants will be accorded ten days after receipt to file and serve objections or other comments respecting plaintiff's proposed order. Thereafter, an injunction in favor of plaintiff will issue.

New Orleans, Louisiana, October 20, 1970.

FRED J. CASSIBRY
United States District Judge

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APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 31089

GARY DUNCAN,

Plaintiff-Appellee,

versus

LEANDER H. PEREZ, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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(June 14, 1971)

Before GODBOLD, SIMPSON and CLARK, Circuit Judges.

SIMPSON, Circuit Judges: On October 20, 1970, the district judge entered an order supported by a detailed opinion, permanently enjoining Leander Perez, Jr., the District Attorney of Plaquemines Parish, Louisiana, from further prosecuting the appellee, Gary Duncan, in the Louisiana state courts on a charge of simple battery. *Duncan v. Perez*, E.D. La. 1970, 321 F.Supp. 181. The United States Supreme Court, on February 23, 1971,

decided *Younger v. Harris*, 400 U.S. ....., 91 S.Ct. 746, 27 L.Ed.2d 669. The appellant asks us to reverse the judgment of the district court as violative of the Supreme Court's ruling in *Younger v. Harris*.[1] We find that the district judge accurately forecast by his opinion the criteria which the Supreme Court established in *Younger v. Harris* for the grant of federal injunctive relief against state prosecutions. Accordingly, we affirm.

The facts are gone into fully in the district court opinion, and will be repeated here only to the extent necessary to our disposition. On October 18, 1966, the appellee, a 19 year old Negro, intervened in a street confrontation between two of the appellee's young relatives, a nephew and cousin, and four young white boys. Each of the boys involved was about twelve years of age. This incident occurred near the then recently integrated Bootheville-Venice School in Plaquemines Parish, and led to the filing of a charge against Gary Duncan of cruelty to a juvenile, allegedly because Duncan slapped Herman Landry, Jr., one of the white boys, on the arm. The charge was based upon an affidavit sworn to by Landry, Sr. before a Justice of the Peace in Port Sulphur, Louisiana. The Justice of the Peace at nearby Venice was avoided because he was Landry, Sr.'s step-father. When it was discovered at a preliminary hearing that the cruelty to a juvenile charge was applicable only in a parentchild situation, that charge was

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[1] *Younger v. Harris*, 1971, 400 U.S. ....., 91 S.Ct. 746, 27 L.Ed.2d 669, decided February 23, 1971, with five other cases, each dealing in one phase or another with appropriate guidelines to be followed in the delicate interplay between the federal and state sovereignties in the carrying out of their respective functions. The other February 23 cases are: *Boyle v. Landry*, 1971, ... U.S. ....., 91 S.Ct. 758; 27 L.Ed.2d 696; *Samuels v. Mackell*, 1971, 91 S.Ct. 764, 27 L.Ed.2d 688; *Dyson v. Stein*, 1971, ... U.S. ....., 91 S.Ct. 769, 27 L.Ed.2d 781; *Perez v. Ledesma*, 1971, ... U.S. ....., 91 S.Ct. 674, 27 L.Ed.2d 701; and *Byrne v. Karalexis*, 1971, ... U.S. ....., 91 S.Ct. 777, 27 L.Ed.2d 792.

dropped and the battery charge substituted. Following a non-jury trial, appellee was found guilty of simple battery on January 25, 1967, and sentenced to two months in prison and a fine of $150.00, with an additional twenty days in prison if the fine was not paid. The conviction was denied review in the Louisiana Supreme Courts, 250 La. 253, 195 So.2d 142, but on the ground that Duncan had been deprived of his constitutional right to trial by jury, the United States Supreme Court granted certiorari and reversed the conviction. *Duncan v. Louisiana*, 1968, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491, reh. denied 392 U.S. 947, 88 S.Ct. 2270, 20 L.Ed.2d 1412.

On January 3, 1969, appellee instituted this action pursuant to Title 42, U.S.C. 1983, Title 28, U.S.C. 1343(3) and Title 28, U.S.C. 2201-2, in an effort to bar his retrial on the simple battery charge.[2] Trial was held below June 8, 1970, at which time the district judge agreed to take judicial notice of the record made before him in the case of *Sobol v. Perez*, E.D. La., 1968, 289 F.Supp. 392. In addition he heard live testimony and received and considered numerous depositions. In his opinion, the district judge recited at great length the steps taken to make the simple battery prosecution as burdensome as possible for the appellee[3] and the history of race

[2] After the Supreme Court's decision in *Duncan*, the Louisiana legislature reduced the maximum sentence for simple battery from two years to six months. As a result, appellee, prior to the issuance of the district court's opinion and order, faced retrial without a jury.

[3] The district court's opinion notes inter alia that appellee was during the course of the first simple battery prosecution, subjected to multiple arrests, repeated resettings of unusually high pre-conviction bail, the unusually severe sentence, the unlawful demand for a double appeal bond, the comments of the appellant Perez and the state trial judge, and the arrest of his chief counsel on a baseless charge of the unlawful practice of law. In the latter connection and for an insight into the bitterness inherent throughout in this proceeding and its by-products, see *Sobol v. Perez*, E.D. La. 1968, 289 F.Supp. 392, holding that Sobol's arrest was made in bad faith and for purposes of harassment. His further prosecution was enjoined. *Sobol v. Perez* was not appealed.

relations in Plaquemines Parish[4] in recent years. On the basis of his carefully detailed recitation, the following findings were made by the district judge:

1. The simple battery prosecution was being maintained by Leander Perez, Jr. in bad faith and for purposes of harassment;

2. There was no legitimate state interest in the reprosecution of appellee;

3. The reprosecution of appellee would deter and suppress the exercise of federally secured rights by Negroes in Plaquemines Parish; and

4. Injunctive relief was not barred by the Anti-Injunction Statute, Title 28, U.S.C., § 2283.

As noted above, the tenor and holding of *Younger v. Harris* was accurately and prophetically anticipated by the careful opinion below. We read *Younger v. Harris* to hold that an individual is not entitled to federal injunctive relief against a state prosecution which has been instituted by state officials in good faith unless irreparable injury to the state court defendant (as was shown in *Dombrowski v. Pfister*, 1965, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22) can be established. On the other hand, should the state court defendant be able to establish that the state prosecution has been instituted *in bad faith and for purposes of harrassment* — as put by the concurring opinion in *Younger v. Harris* of Mr. Justice Brennan for himself and Jus-

[4] Some related matters are further documented and explicated by our opinion in *Plaquemines Parish School Board v. United States*, 5 Cir. 1969, 415 F.2d 817-835.

tices White and Marshall, "official lawlesness" — irreparable injury need not be shown provided there is present a basis for federal jurisdiction, e.g. Title 28, U.S.C., Sec. 1343 and Title 42, U.S.C., Sec. 1983. Additionally, the district judge in the case at bar found that the retrial of Duncan "will cause irreparable injury to the exercise of federally secured rights by Negro residents of Plaquemines Parish". A further significant finding was that any violation which may have accurred was so slight that the State of Louisiana did not have a legitimate interest in reprosecution after reversal of the prior conviction. This observation was amplified by the following statement:

> ". . . whether Duncan slapped or simply touched the white youth on the arm, it is clear beyond dispute that any violation that may have occurred was so slight and technical as to be generally reserved for law school hypotheticals rather than criminal prosecutions. The white boy was not hurt and displayed no bruise minutes after the incident. De minimus 'batteries' of this kind occur repeatedly in Plaquemines Parish and elsewhere and do not become the subject of criminal proceedings."

We have carefully studied the district court's detailed opinion, his carefully buttressed conclusions of law, and the resultant order for permanent injunction in the light of the "clearly erroneous" concept by which we are bound. Rule 52(a), F.R.Civ.P., *McAllister v. United States*, 1954, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20. We are not able to perceive any basis for reversal of the lower court's judgment. Under the "clearly erro-

neous" standard, that judgment is due for affirmance by us. We agree with the district judge's holding that in the circumstances here Title 28, U.S.C., Section 2283, presented no bar to the injunctive order entered by him.

The judgment of the district court is in all respects

AFFIRMED.